[Cite as *TCF Natl. Bank v. Smith*, 2010-Ohio-1336.]

COURT OF APPEALS
STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TCF NATIONAL BANK FBO AEON FINANCIAL, LLC

Plaintiff-Appellant

-vs-

CHERYL L. SMITH, et al.

Defendants-Appellees

JUDGES:
Hon. Sheila G. Farmer, P.J.
Hon. W. Scott Gwin, J.
Hon. John W. Wise, J.

Case No. 2009 CA 00101

O P I N I O N

CHARACTER OF PROCEEDING:	Civil Appeal from the Court of Common Pleas, Case No. 2008 CV 04694
JUDGMENT:	Affirmed
DATE OF JUDGMENT ENTRY:	March 29, 2010

APPEARANCES:

For Plaintiff-Appellant

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For Defendants-Appellees

Wise, J.

{¶1} Plaintiff-Appellant TCF National Bank FBO Aeon Financial, LLC appeals the March 31, 2009 Judgment Entry entered by the Stark County Court of Common Pleas, awarding it attorney fees in an amount less than sought. The relevant facts leading to this appeal are as follows.

{¶2} Appellant purchased a tax lien certificate from the Stark County Treasurer on a property located in Stark County, Ohio. Subsequently, Appellant filed a Complaint for Foreclosure, pursuant to R.C. 5721.30 to 5721.46. Appellant's counsel filed a motion for private attorney's fees with a supporting Affidavit attached. The motion requested $2,500.00 in attorney fees, to be taxed as a cost of the private foreclosure action, and requested a hearing.

{¶3} The motion for attorney fees was unopposed. Thereafter, the trial court issued an Order and Decree of Foreclosure awarding attorney fees in the amount of $450.00.

{¶4} It is from this Judgment Entry Appellant appeals, raising as its sole Assignment of Error:

{¶5} "THE TRIAL COURT ERRED AS A MATTER OF LAW IN REDUCING AEON'S STATUTORILY RECOVERABLE ATTORNEY FEES, BELOW THE $2,500 IT INCURRED AND REQUESTED, BECAUSE THE COURT FAILED TO ACCORD AEON THE BENEFIT OF THE STATUTORY PRESUMPTION OF REASONABLENESS CREATED BY THE OHIO LEGISLATURE, IN R.C. SECTION 5721.371, IN FAVOR OF A TAX CERTIFICATE HOLDER FOR ATTORNEY FEES INCURRED IN TAX

CERTIFICATE FORECLOSURE CASES WHERE SUCH FEES DO NOT EXCEED $2,500."

I

{¶6} At the heart of this litigation is the question of whether Ohio law gives a trial court discretion to determine the reasonableness of attorney fees in its judgment of tax certificate foreclosure cases filed pursuant to R.C. 5721.37, et seq. We believe that it does.

{¶7} In *Alyeska Pipeline Service Co. v. Wilderness Society* (1975), 421 U.S. 240, the United States Supreme Court reaffirmed the "American Rule" which provides that each party in a lawsuit ordinarily shall bear its own attorney fees unless there is express statutory authorization to the contrary. Of relevance to the case at bar, the Ohio Legislature has provided for the recovery of attorney fees for prosecuting tax certificate foreclosures. R.C. 5721.39 provides, in pertinent part:

{¶8} "(A) In its judgment of foreclosure rendered in actions filed pursuant to section 5721.37 of the Revised Code, the court or board of revision *shall enter a finding* that includes all of the following with respect to the certificate parcel:

{¶9} "***

{¶10} "(5) Fees and costs incurred in the foreclosure proceeding instituted against the parcel, including, *without limitation,* the fees and costs of the prosecuting attorney represented by the fee paid under division (B)(3) of section 5721.37 of the Revised Code, plus interest as provided in division (D)(2)(d) of this section, or *the fees and costs of the private attorney representing the certificate holder,* and charges paid or

incurred in procuring title searches and abstracting services relative to the subject premises." (Emphasis added.)

{¶11} R.C. 5721.371 provides trial courts with guidance in determining the fees counsel may recover in a tax certificate foreclosure case. The statute provides:

{¶12} "Private attorney's fees payable with respect to an action under sections 5721.30 to 5721.46 of the Revised Code are subject to the following conditions:

{¶13} "(A) The fees must be reasonable.

{¶14} "(B) Fees exceeding two thousand five hundred dollars shall be paid only if authorized by a court order.

{¶15} "(C) The terms of a sale negotiated under section 5721.33 of the Revised Code may include the amount to be paid in private attorney's fees, subject to division (B) of this section."

{¶16} In the case at bar, appellant argues, in essence, because fee applications in the amount of $2,500 or less do not require a court order, thus, in both practice and effect, the Ohio Legislature has determined that attorney fees of up to $2,500 are presumptively reasonable for a tax certificate foreclosure matter; and, absent challenge by an opposing party, are entitled to deference by the court. See, Appellant's Brief at 12-14. However, the requirements in R.C. 5721.39(A) and R.C. 5721.371, when read in pari materia, would seem to indicate a trial court shall make findings on attorney fees, including the consideration of reasonableness, before awarding the fees and costs of the private attorney representing the certificate holder.

{¶17} We find nothing within the statutes that set a presumptive amount for recoverable attorney fees, nor anything that obviates a trial court's discretion in making

the award. Surely, without an order from the trial court, attorney fees could not be assessed or recovered.

{¶18} In *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146, quoting *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.* (1985), 23 Ohio App.3d 85, 91, the Supreme Court of Ohio held, " 'It is well settled that where a court is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the trial court. Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere.' " "There are over 100 separate statutes providing for the award of attorney's fees; and although these provisions cover a wide variety of contexts and causes of action, the benchmark for the awards under nearly all of these statutes is that the attorney's fee must be 'reasonable.' " *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* (1986), 478 U.S. 546, 562.

{¶19} "A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise 'billing judgment' with respect to hours worked, see *supra,* at 1939-1940, and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims.***" *Hensley v. Eckerhart* (1983) 461 U.S. 424, 437. (Footnote omitted.)

{¶20} "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a

reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." Id. at 433; See, also *Bittner,* at 145.

{¶21} To establish the number of hours reasonably expended, the party requesting the award of attorney fees "should submit evidence supporting the hours worked***." *Hensley,* at 433. The number of hours should be reduced to exclude "hours that are excessive, redundant, or otherwise unnecessary" in order to reflect the number of hours that would properly be billed to the client. Id. at 434. A reasonable hourly rate is defined as " 'the prevailing market rate in the relevant community.' " *Blum v. Stenson* (1984), 465 U.S. 886, 895.

{¶22} The party requesting an award of attorney fees bears the burden "to produce satisfactory evidence-in addition to the attorney's own affidavits-that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." Id. at 895, fn. 11.

{¶23} Once the trial court calculates this "lodestar figure," it could modify the calculation by applying the factors listed in DR 2-106(B), now Ohio Rules of Professional Conduct 1.5. *Landmark Disposal Ltd. v. Byler Flea Market*, Stark App. No. 2005CA00294, 2006-Ohio-3935, ¶14, citing *Bittner,* at 145.

{¶24} To enable an appellate court to conduct a meaningful review, "the trial court must state the basis for the fee determination." *Bittner,* at 146. In this case, the trial court did not award appellants the full amount of attorney fees requested and did not state what factors it took into consideration. Nevertheless, we do not find a need for any further hearing. The thrust of appellant's argument is that the $2,500.00 statutory

attorney fees are automatic and a hearing on reasonableness is only necessary if the fees exceed said amount:

{¶25} "Pursuant to R.C. Section 5721.371, the trial court's review of attorney fees under the Ohio tax foreclosure statutes is limited to only two situations: 1) where reasonableness is at issue, or 2) where the fees sought exceed $2,500. Under the statute, a court order is required only when the payment of fees sought exceeds $2,500. Fee applications in the amount of $2,500 or less do not require a court order. Thus, in both practice and effect, the Ohio Legislature has determined that attorney fees of up to $2,500 are presumptively reasonable for a tax certificate foreclosure matter; and, absent challenge by an opposing party, are entitled to deference by the court.

{¶26} "The practical effect of such a presumption under the statute is this: when the fees sought are $2,500 or less, and no opposing party contests them as unreasonable (or otherwise attempts to rebut the statutory presumption), a trial court has no discretion to limit or reduce the payment of such fees, because the presumption of reasonableness stands unrebutted." Appellant's Brief at 5-6.

{¶27} In fact, appellant's only request is for the fees awarded by the trial court to be reversed and an award of $2,500.00 in fees to be entered:

{¶28} "This court must reverse the decision of the trial court on the issue of attorney fees and order that the $2,500 Aeon incurred be taxed as costs from the proceeds of Sheriff's Sale, plus the costs of this appeal." Appellant's Brief at 27.

{¶29} The assignment neither requests a hearing nor does it argue that a hearing on attorney fees is necessary for a $2,500.00 attorney fees claim.

{¶30} The sole Assignment of Error is overruled.

{¶31} For the foregoing reasons, the judgment of the Court of Common Pleas of Stark County, Ohio is hereby affirmed.

By: Wise, J.

Farmer, P. J., concurs.

Gwin, J., dissents.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

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JUDGES

JWW/d 0316

Gwin, J., dissenting

{¶31} In the case at bar, Appellant filed a "MOTION FOR ATTORNEY FEES" and specifically requested a hearing. There is nothing within the record of this case that tells me how the trial court answered the question of whether attorney fees of up to $2,500 as set forth in R.C. 5721.371 are presumptively reasonable for a tax certificate foreclosure matter and, absent a challenge by an opposing party, are entitled to deference by the court. In other words, the trial court may have rejected this argument and determined that it had sole discretion to determine the reasonable amount of attorney fees. However, it is equally possible from the record before this Court, that the trial court accepted appellant's argument that $2,500 was presumed reasonable, but also found that, even though no other party challenged the reasonableness of the amount requested by the appellant, the court retained discretion to adjust the amount based on the factors set forth in *Tri-County.* How then can this Court answer the question in the manner that the majority has when we do not know the reasons behind the trial court's award of attorney fees in this case?

{¶32} Appellant dissects its sole assignment of error into a number of sub-parts or "issues." Specifically, in the case at bar, appellant posits in its brief as follows,

{¶33} "D. A movant meets its burden of proof for recoupment of its attorney fees under the statute by affirmatively establishing (by Affidavit or otherwise) that such fees were incurred and are reasonable.

{¶34} "E. Where movant does not seek recoupment of fees in excess of the statutory amount and no party disputes reasonableness, a court exceeds its permissible authority under the statute by ordering payment of an amount less than the amount incurred."[1]

{¶35} Thus, I would find that both the "reasonableness" of the amount of appellant's

[1] Appellant's Brief at i-ii; 1-2; 22-24.

request for attorney fees in the trial court, as well as the trial court's discretion to decide the amount of attorney fees that were warranted in this case are raised by appellant in this Court.

{¶36} The majority unfairly limits the appellant's argument to whether the statute creates a presumptive amount of attorney fees in a tax certificate foreclose case. Whether the statute creates a presumption that $2,500.00 is the reasonable amount of attorney fees does not end the inquiry. Rather, necessary to the resolution of appellant's assignment of error is whether the trial court has discretion, on a case by case basis according to the factors identified in *Tri-County*, to adjust the amount awarded as attorney fees when no one challenges the reasonableness of the amount submitted. Accordingly, at the heart of this litigation is the question of whether Ohio law gives a trial court discretion to determine the reasonableness of attorney fees in its judgment of tax certificate foreclosure cases filed pursuant to R.C. 5721.37 et seq. I believe that it does.

{¶37} "It is well settled that where a court is empowered to award attorney fees by statute, the amount of such fees is within the sound discretion of the trial court. Unless the amount of fees determined is so high or so low as to shock the conscience, an appellate court will not interfere." *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 146, 569 N.E.2d 464, quoting *Brooks v. Hurst Buick-Pontiac-Olds-GMC, Inc.* (1985), 23 Ohio App.3d 85, 91, 491 N.E.2d 345. "There are over 100 separate statutes providing for the award of attorney's fees; and although these provisions cover a wide variety of contexts and causes of action, the benchmark for the awards under nearly all of these statutes is that the attorney's fee must be 'reasonable'." *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air* (1986), 478 U.S. 546, 562, 106 S.Ct. 3088, 3096.

{¶38} "A request for attorney's fees should not result in a second major litigation.

Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates. The applicant should exercise 'billing judgment' with respect to hours worked, see *supra,* at 1939-1940, and should maintain billing time records in a manner that will enable a reviewing court to identify distinct claims". *Hensley v. Eckerhart* (1983) 461 U.S. 424, 437, 103 S.Ct. 1933, 1941. [Footnotes omitted].

{¶39} "The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services." *Hensley v. Eckerhart* (1983), 461 U.S. 424, 433, 103 S.Ct. 1933, 1939. See, also *Bittner v. Tri-County Toyota, Inc.,* supra, 58 Ohio St.3d at 145; 569 N.E.2d at 466.

{¶40} To establish the number of hours reasonably expended, the party requesting the award of attorney fees "should submit evidence supporting the hours worked ...." *Hensley,* 461 U.S. at 433, 103 S.Ct. at 1939. The number of hours should be reduced to exclude "hours that are excessive, redundant, or otherwise unnecessary" in order to reflect the number of hours that would properly be billed to the client. Id. at 434, 103 S.Ct. at 1939-40. A reasonable hourly rate is defined as "the 'prevailing market rate [ ] in the relevant community.'" *Blum v. Stenson* (1984), 465 U.S. 886, 895, 104 S.Ct. 1541, 1547.

{¶41} The party requesting an award of attorney fees bears the burden "to produce satisfactory evidence--in addition to the attorney's own affidavit--that the requested rate [is] in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." *Blum v. Stenson,* supra 465 U.S. at, 895 n. 11,

104 S.Ct. at 1547 n. 11.

{¶42} Once the trial court calculates the "Lodestar figure," it could modify the calculation by applying the factors listed in DR 2-106(B)[2], *Landmark Disposal Ltd. v. Byler Flea Market*, Stark App. No.2005CA00294, 2006-Ohio-3935, paragraph 14, citing *Bittner v. Tri-County Toyota, Inc.* (1991), 58 Ohio St.3d 143, 145, 569 N.E.2d 464.

{¶43} To enable an appellate court to conduct a meaningful review, "the trial court must state the basis for the fee determination." *Bittner,* 58 Ohio St. 3d at 146. In *Bittner,* the court held:

{¶44} " * * * the trial court should first calculate the number of hours reasonably expended on the case times an hourly fee, and then may modify that calculation by application of the factors listed in DR 2-106(B). These factors are: the time and labor involved in maintaining the litigation; the novelty and difficulty of the questions involved; the professional skill required to perform the necessary legal services; the attorney's inability to accept other cases; the fee customarily charged; the amount involved and the results obtained; any necessary time limitations; the nature and length of the attorney/client relationship; the experience, reputation, and ability of the attorney; and whether the fee is fixed or contingent. All factors may not be applicable in all cases and the trial court has the discretion to determine which factors to apply, and in what manner that application will affect the initial calculation." *Bittner,* 58 Ohio St. 3d at 145-146.

{¶45} In this case, as in *Bittner***,** the trial court did not award appellants the full amount of attorney fees requested and did not state what factors it took into consideration. Without such a statement from the trial court, it is not possible for an appellate court to conduct a meaningful review. Accordingly, I would find that the matter must be remanded to the trial

[2] Now Prof. Cond. Rule 1.5

court.

{¶46} The trial court must specify which factors contained in Prof. Cond. Rule 1.5 the trial court considered, if any, when determining the amount of appellant's award of attorney fees. Because I find that there are insufficient findings made to conduct a meaningful review on appeal I would sustain appellant's assignment of error, reverse the judgment of the Stark County Court of Common Pleas and remand the cause to the trial court.

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JUDGE W. SCOTT GWIN

IN THE COURT OF APPEALS FOR STARK COUNTY, OHIO
FIFTH APPELLATE DISTRICT

TCF NATIONAL BANK FBO AEON FINANCIAL, LLC	:	
Plaintiff-Appellant	:	
-vs-	:	JUDGMENT ENTRY
CHERYL L. SMITH, et al.	:	
Defendants-Appellees	:	Case No. 2009 CA 00101

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Stark County, Ohio, is affirmed.

Costs assessed to appellant.

/S/ JOHN W. WISE_____

/S/ SHEILA G. FARMER_____

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JUDGES